* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

January 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **August 11, 2004**

Case No.: **TIA-0161**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contactor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a telecom engineer and a systems engineer at the Westinghouse Savannah River Site (the site). He worked at this site for approximately 16 years, from January 1989 to the present.

The Applicant filed an application with the OWA, requesting that a physician panel review his chronic dermatitis. The Applicant asserted that his illness was due to exposure to toxic and hazardous materials and chemicals, including ingesting water that was contaminated by trichloroethylene, in the site buildings in which he worked. The Physician Panel rendered a negative determination and the OWA accepted it. The Applicant subsequently filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was

related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

In his appeal, the Applicant states that the date of the illness onset noted by the Panel is incorrect. He asserts that the onset of the chronic dermatitis coincided with his ingestion of contaminated water in 1989, rather than 2000 as noted by the Panel. The Applicant claims that he drank water which was "contaminated with trichloroethylene that was 4 times the standard domestic drinking water of 0.005ppm."[1] The Applicant also states that he has seen three dermatologists and one allergist for treatment of his condition. Although none of these doctors can determine the "etiology of the chronic dermatitis, when asked if ingesting trichloroethylene could be a significant factor in causing or contributing to this illness, [they stated that] the answer is yes."[2] In addition, the Applicant claims exposure to other chemicals and toxic substances in the course of working at the site, including asbestos and radiation. He asserts that "incidental exposure to radiation and asbestos while suffering from chronic dermatitis, an open wound, was a significant factor in aggravating [this] condition."[3]

In its report, the Panel wrongly listed the "date of onset" of the illness as 2000, instead of 1989. However, the narrative of the report shows that the Panel contemplated that the onset of the Applicant's chronic dermatitis occurred before 2000. The Panel cites a medical record documenting the Applicant's referral to a dermatologist in 1991 as evidence that he had the alleged condition.[4] In any event, the record does not provide any evidence that the Applicant ingested trichloroethylene-contaminated water at the site. Therefore, the Panel could not evaluate whether ingestion of contaminated water could have caused the Applicant's condition. In addition, the Panel could find no evidence supporting the Applicant's claims that exposure to radiation and asbestos aggravated his condition. The record did not contain dosimetry records, the National Institute for Occupational Safety and Health (NIOSH) dose reconstruction, site analysis, area sampling, or industrial hygiene records demonstrating such exposures. Accordingly, the Panel reasonably determined that in his position as

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[1] Applicant's Appeal Letter.
[2] *Id.*
[3] *Id.*
[4] *See* Physician Panel Report, at 1.

telecom and systems engineer, the Applicant's "job duties would not expose him to any chemical or radiation health hazards."[5]

As the foregoing indicates, the Physician Panel addressed the Applicant's claims, made a determination, and explained the reasoning for its conclusion. The Applicant's appeal merely expresses disagreement with the Panel's medical judgment, rather than an indication of error on the part of the Panel. Therefore, the appeal should be denied.

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0161 be, and hereby is, denied.

(2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 11, 2005

[5] *Id; see also* Record, at 17-18.